

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 382 of 1991****For Approval and Signature:****HONOURABLE MR.JUSTICE RAVI R.TRIPATHI**

=====

1 Whether Reporters of Local Papers may be
allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the
fair copy of the judgment ?

4 Whether this case involves a substantial
question of law as to the interpretation
of the constitution of India, 1950 or any
order made thereunder ?

5 Whether it is to be circulated to the
civil judge ?

=====

SHAFIMOHMMED @ BOGHO S.O.FAKIR MOHAMMED

Versus

STATE OF GUJARAT

=====

Appearance :

MR VM PANCHOLI for the Appellant

MR AJ DESAI, ADDITIONAL PUBLIC PROSECUTOR for the Opponent

=====

CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 12-13/09/2006

ORAL JUDGMENT

1. The appellant - accused being aggrieved of judgment and order passed in Sessions Case No.144 of 1989 by the learned Additional Sessions Judge, Ahmedabad (Rural) dated 30.04.1991, whereby the learned Sessions Judge was

pleased to convict the accused - appellant for an offence punishable under Section 326 of the Indian Penal Code and sentenced him for 2 years R.I., fine of Rs.1,000/- and in default, 2 months R.I., is before this Court.

2. The case of the prosecution is that the complainant - Vinodkumar Mohanlal Gandhi is residing in 'Dhobi Maholla' at Sanand with his family. Kamlaben is his wife. On the day of incident, i.e. 02.06.1989, he had gone to his shop - a Grain Shop situated in vegetable market, in old Sanand since morning. Around 6 O'clock in the evening, one Shri Dineshbhai Dalshukhbhai came to his shop and told that he is called at his residence and therefore, he - the complainant went to his house on scooter. He found that his wife was bleeding from abdomen and was sitting in rickshaw with the neighbour - Sarojben. The complainant was informed by said Sarojben that son of Fakirmohammed, named 'Bogho' had gone inside the house of the complainant, at that time, Kamlaben was all alone in the house. Therefore, Kamlaben had asked 'Bogho' as to why had he come in the house, there is nobody in the house. On Kamlaben saying so, 'Bogho' - the accused got enraged and with a sharp cutting weapon, inflicted blow in the abdomen of Kamlaben, which caused bleeding. The complainant along with Sarojben and Dhobi Sivdattbhai had taken his wife - Kamlaben to Community Health Centre - Sanand. The doctor after giving the

primary treatment, asked the complainant to take his wife immediately to Ahmedabad. The complainant took his wife in an ambulance to V.S.Hospital, Ahmedabad.

3. On registering of complaint, the Investigating Officer recorded the statement of injured - Kamlaben in V.S.Hospital. Statements of her son Anilkumar and Minaben, Bharatbhai were also recorded. The complainant produced the cloths which were taken by the police in presence of Panchas. Thereafter, on 03.06.1989, 'Dying Declaration' of injured - Kamlaben was recorded. The Investigating Officer recovered the knife, produced by the accused in Police Station. The accused was arrested after drawing a Panchnama on the same day, i.e. 03.06.1989. Panchnama of scene of offence was also drawn. Statements of Sarojben, Urmilaben, Lilaben, Bhanuben etc. were recorded. On receipt of 'Injury Certificate' of Kamlaben, charge sheet was filed.

4. As the accused was charged with an offence under Section 307 of the Indian Penal Code, triable by the Sessions Court, the case was committed to the Sessions. After hearing the A.P.P. and the advocate for the accused, charge under Sections 307 of the Indian Penal Code was framed. The same was read over to the accused. As the accused did not admit the guilt, the case was tried.

The prosecution examined the following witnesses:

- (I)PW1 - Vinodchandra Mohanlal Gandhi - the complainant (not an eye witness) at Exh.6.
- (II)PW2 - Kanaiyalal Manilal Barot (Circle Inspector, who prepared the map) at Exh.10.
- (III)PW3 - Kamlaben Vinodbhai (injured) at Exh.12.
- (IV)PW4 - Kantilal Sarupchand (Panch witness) at Exh.15.
- (V)PW5 - Jayendrakumar Jamnadas (Panch witness) at Exh.17.
- (VI)PW6 - Sarojben Chimanlal (neighbour) at Exh.19.
- (VII)PW7 - Baldevbhai Khoda (Panch witness) at Exh.20.
- (VIII)PW8 - Paresh Mahendra Shah (Doctor at V.S.Hospital) at Exh.23.
- (IX)PW9 - Bharatkumar Bipinchandra Oza (Doctor at Community Health Centre, Sanand) at Exh.25.
- (X)PW10 - Popatji Masangji Chavda (I.O.) at Exh.27.

The prosecution also relied upon the following documentary evidences:

- (I)Complaint dated 02.06.1989 at Exh.7.
- (II)Panchnama at Exh.16.
- (III)Panchnama at Exh.18.
- (IV)Panchnama at Exh.21.

(V) Injury Certificate at Exh.24.

(VI) Injury Certificate at Exh.26.

(VII) F.S.L. Report at Exh.30.

5. Mr.V.M.Pancholi, learned advocate for the appellant emphatically submitted that there is material discrepancies in the medical evidence - Injury Certificate and deposition of the doctor on one hand and the deposition of the injured herself (Exh.12) on the other. The learned advocate invited attention of the Court to the deposition of Kamlaben - the injured and submitted that, it is the specific case of the injured that she was given **TWO BLOWS** by knife. The injured has specifically stated that one blow was given on the side portion of the naval, whereas the second blow was given below the naval. The learned advocate for the appellant submitted that from the deposition of the doctor and the Injury Certificate, only one blow is found. Thus, there is material contradictions on a very important material aspect.

The learned advocate for the appellant submitted that the learned Additional Sessions Judge has tried to explain away this material discrepancy in paragraph No.17 of the judgment and order, by saying that, 'the injured while deposing has stated that she was given **TWO BOLWS**, this must have been done with a view to exaggerate the injury sustained by her.' The learned Judge then states

that, 'only on this ground, it cannot be said that the injured is giving false evidence before the Court.' The learned Judge has also recorded that as the injured - Kamlaben has admitted that her son, Anil and the accused were having friendship, even on the day of the incident Anil and the accused had played together and Anil and the accused have no enmity. The learned Judge has drawn a conclusion that in such circumstances, if the injured - Kamlaben was caused injury by somebody else then she would not implicated the accused falsely, allowing the real culprit to go scot-free.

6. In the considered opinion of this Court, the discrepancy pointed out by the learned advocate for the appellant is not that simple and cannot be brushed aside so easily. Normally, in a case wherein a person or persons is/are beaten by a group of persons, there is a scope of discrepancy which may be explained by saying that there may be some exaggeration. But, when it is matter of a blow inflicted on oneself and that too by one single assailant and that too 'single blow', there is no scope for the injured to say that two blows were given. Sometimes, when a person is inflicted number of blows, may be 7, 8, 9, 19, there is a possibility of missing the exact number of blows. But, when in a case of 'single blow', there is hardly any scope for any mistake. In such a case, if it is so done, even for 'exaggerating'

the injury sustained by oneself, it can certainly not be brushed aside as is done by the learned Additional Sessions Judge.

7. Learned advocate for the appellant invited attention of the Court to few other discrepancies, which if taken together, a doubt is created about the 'truthfulness' of the evidence of the injured. Once that happens, the evidence loses its trustworthiness. The other discrepancy pointed out by the learned advocate for the appellant is, in cross-examination of the injured - Kamlaben. It is specifically stated in paragraph No.6j that, 'the blood which came out from the abdomen of the injured had fallen on the floor of the kitchen. But, when Panchnama of scene of offence is perused, no blood is found on the floor of the kitchen. He submitted that it is not the case of the prosecution that the kitchen was cleaned in the meantime, i.e. after the incident and before the Panchnama was drawn.

Learned advocate for the appellant next submitted that in paragraph No.7 of the cross-examination of the injured, it is mentioned that, 'the weapon by which she was given the blow has a 'wooden handle', whereas the weapon seized by the police, is with a wooden cover' - sheath/scabbard', 7 inch long, front portion is sharp edged and pointed one, having 4 inch long aluminum handle having a bend of about an inch.

The learned advocate then invited attention of the Court to Exh.31 wherein Sample-3A-knife is described. Its blade is stated to be 17 cm long and handle is stated to be 10.5 cm long. The learned advocate invited attention of the Court to Exh.30 - F.S.L. Report wherein it is specifically stated in the result column of analysis that on samples-3A and 3B no blood was found.

8. Learned advocate for the appellant then invited attention of the Court to the 'Injury Certificate' given by the doctor of Community Health Centre, Sanand - Exh.26. It is mentioned in the certificate that:

"H/O Assault Date 02.06.1989, Time 6.30 PM
Stab Injury Right Upper Abdomen.
Vertical 1 1/2" below costal margin
Size 1" X 1/2" X 1/4"
above Injury is due to sharp pointed object,
for further treatment patient is referred to
V.S.Hospital, A'bad."

The Injury Certificate issued by V.S.Hospital, Ahmedabad is at Exh.24. The Certificate contains following information:

"Informant self
Alleged H/o stab injury with sharp instrument in
abdomen
C/o Local pain
no vomiting
P.72/M 0/0 concise

BP 104/80

2.5 c.m. Long oblique sutured wound in epigastric region to the mid line Three stitches present.

Mild swelling around the area

soft abdomen / no Distention

No guarding / No Rigidity

Peristalsis +

On exploration Intraperitoneal extension

Laparotomy performed

FINDINGS Haemoperitoneu with haemorrhage at pyloric region

No acute bleeding."

9. Learned advocate for the appellant submitted that in the deposition of Dr. Bharatkumar Bipinchandra Oza - doctor at Sanand, he has stated in paragraph No.4 of the cross-examination that, he does not remember to have administered 'glucose' to the patient in the Community Health Centre. He has also stated that, 'the day when he examined the patient, he did not notice any other injury then the one which is mentioned in the certificate; that when the patient come to the doctor, she was able to talk, able to speak and was able to identify.' The doctor in cross-examination in detail has deposed that, when an injury is caused with a weapon like knife and weapon is withdrawn, it is not necessary that a lump of muscle shall come out; that if the wound is pressed, it is not necessary that the size of the wound will get reduced; that it is not necessary that if blow is given with sharp pointed weapon on abdomen and if the weapon is

withdrawn, there will be a flow of blood. He deposed that, it depends upon the patient whether one will become unconscious or will stop talking. He deposed that, in an injury caused to the injured, it is possible that blood veins in the abdomen may get cut; that almost in the entire abdomen part blood veins are situated, the blood gets stopped because of its quality of clotting.

Learned advocate for the appellant also invited attention of the Court to the deposition of doctor Paresh Mahendra Shah – doctor at V.S.Hospital. The doctor has deposed about the injury sustained by the injured - Kamlaben. He has deposed that she has sustained stab wound in the upper part of the abdomen; 2.5 cm long and there were stitches; that there was swelling near the wound, except this, no other injury was noticed; that after opening the stitches, on examination, it was found that the wound was deep in the abdomen; that it has punctured the wall of the abdomen; that the blood was noticed in the right open part of the abdomen, right lower part of the abdomen and below the naval; that the blood was also found at the joint of liver and the stomach; that the patient was admitted as an indoor patient and was relieved on 12.06.1989. The doctor has then deposed that the injury can be stated to be serious injury. The doctor has deposed that when the patient was brought, she was conscious. He has then explained what

the term 'conscious' means. He stated that she was able to open her eyes and was able to give answers to the questions put by the doctor. The doctor has also deposed that when the patient was operated, except three stitches, there was no other injury. He has deposed that in certificate, measurement of injury/wound is mentioned by first mentioning the length then width and then depth. In certificate it is mentioned to be 2.5 cm, i.e. length, width and the depth is not mentioned. He has also deposed only one measurement of 2.5 cm is mentioned, other columns meant for width and depth are kept blank, as it was not possible to measure.

13.09.2006

10. Learned advocate for the appellant invited attention of the Court to Section 324 of the Indian Penal Code ("IPC", for short) and submitted that in the present case, even if it is believed and held that the injury is caused by the appellant then also it should be taken to have caused only - 'hurt' and not a 'grievous hurt'. He submitted that the term 'grievous hurt' is defined in Section 320 of the IPC. He submitted that 8th explanation is relevant which reads as under:

"Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe pain, or unable to follow his ordinary pursuits."

The learned advocate submitted that in the present case, the blow was given in the abdomen of the injured . Injury is 2.5 cm long as per Exh.24 - an Injury Certificate of V.S.Hospital, Ahmedabad, whereas as per the Injury Certificate of Community Health Centre, Sanand - Exh,26, it is 1" X 1/2" X 1/4". The learned advocate submitted that this is required to be taken into consideration in light of the deposition of the doctor of V.S.Hospital who has stated that the patient was admitted in the hospital on 02.06.1989 and was relieved on 12.06.1989. He submitted that there is nothing in the deposition to show that the injury was such which had endangered the life of the injured. In the alternative, it has not caused the injured to suffer severe bodily pain for 20 days. He submitted that it is also not on record that the injured was not able to follow her ordinary pursuits. The learned advocate submitted that it is deposed by the doctor that when the patient was brought to the Community Health Centre at Sanand and thereafter at V.S.Hospital at Ahmedabad, the patient was conscious. Not only that, the patient was able to speak and talk, and was able to answer the questions.

Besides, the learned advocate for the appellant submitted that the prosecution is not able to spell out the motive for which the appellant was tempted to cause injury. He submitted that taking the case of the

prosecution, even at the face value that while the injured was all alone in the house, the accused entered the house and when he was told by the injured that, 'her son - Anil is not in the house, he may go away', this conversation, this conversation does not even remotely suggest a reason which can enrage the accused to such an extent that he will inflict a knife blow. The learned advocate submitted that if the deposition of the injured is considered, the injured has deposed that, 'the accused and her son were friends, they use to plat together and even on the day of the incident, son of the injured had played with the accused.' He submitted that taking all this into consideration, there is no reason for the accused to cause any injury to the injured.

11. The learned advocate for the appellant submitted that there is thin line of distinction between Sections 324 and 326 of the IPC. In Section 324 it is a 'hurt' which is likely to cause death attracts Section 324, whereas in Section 326, it is a 'hurt' which when 'endangering the life', it is classified as, 'grievous hurt'. The learned advocate submitted that if totality of the case is taken into consideration, it will be felt that the accused, if at all, is to be held guilty, looking to all the surrounding factors, it will be in the fitness of things and in the interest of justice to hold him guilty for an offence punishable under Section 324 of

the IPC only.

12. Learned advocate for the appellant submitted that looking to the peculiar facts of this case, viz. the incident is that of 02.06.1989, the Sessions Case is of the year 1989, it was decided in the year 1991 and against that, the appeal is filed in this Court in the year 1991. More than 15 years from the date of conviction have passed, whereas 17 years have passed since the date of incident. The accused and the injured both are residing in the same Maholla, in vicinity, no bitterness is left between the families with the passage of time. At this juncture to ask the accused – appellant to undergo the sentence awarded by the learned Additional Sessions Judge is not warranted. The learned advocate submitted that the age of the accused, on the date of the incident was 18 years. He is now aged 35 years, having his family, consisting of two children. There is nothing on record suggesting that after the alleged incident in the year 1989, there was any other incident giving rise to any other criminal proceedings.

13. Taking into consideration the nature of injury, evidence of the injured and evidence of two doctors, this Court is of the opinion that the injury caused can well be fitted in Section 324 of the IPC. That being so, the order of conviction be altered from 326 to 324 and benefit of Section 360(1) of the Code of Criminal

Procedure ("Cr.P.C.", for short) be extended to the appellant - accused.

14. Section 360(1) of the Cr.P.C. provides that if (i) person is under 21 years of age, (ii) is not convicted for an offence punishable with death or imprisonment for life, (iii) no previous conviction is proved against the offender and (iv) it appears to the Court that regard being had to the age and his family circumstances, it is expedient that the offender should be released on probation of good conduct.

15. Having heard the learned advocate for the appellant, Mr.A.J.Desai, learned Additional Public Prosecutor for the State and taking into consideration the facts and circumstances of the case, the order of conviction passed by the learned Additional Sessions Judge, Ahmedabad (Rural) in Sessions Case No.144 of 1989 dated 30.04.1991 is altered. The conviction be under Section 324 instead of Section 326 of the IPC. The order of sentence is confirmed. However, the accused - appellant is found entitled to the benefit of probation under Section 360 of the Cr.P.C. and Section 5 of the Probation of Offenders Act, 1958. This Court having found that this is a fit case wherein the appellant is required to be released on probation. The order of sentence though confirmed, is suspended and the accused is ordered to be released on probation of good conduct under Sections 4 of the

Probation of Offenders Act, 1958 and 360 of the Cr.P.C. Instead of sentencing the accused at once to imprisonment. He shall be released on probation on his entering into bond in the sum of Rs.5,000/- (Rupees Five Thousand Only) with a surety of the like amount for a period of one year, to appear and receive sentence as and when called upon during the said period and in the meantime, he shall keep peace and he will be of good behaviour and the bond to be executed by the accused shall also include the condition that he shall not indulge or repeat the same offence or commission of any offence.

16. In the result, the impugned conviction is modified. The sentence is confirmed. However, instead of immediately directing the accused - appellant to undergo the sentence of imprisonment, he is released on probation for a period of one year from the date of his executing bond of Rs.5,000/- (Rupees Five Thousand Only) as aforesaid. The appellant is on bail pending this appeal. The bond shall be executed within three weeks. The appeal is partly allowed.

(RAVI R. TRIPATHI, J.)

*Shitole